



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Odetics, Inc.
File: B-246008
Date: February 13, 1992

Richard Clark, Esq., Baker & Hostetler, McCutchen Black, for the protester.
P.E. Zanfagna, Jr., and George N. Brezna, Esq., for the agency.
James W. Vickers, Esq., and William T. Woods, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest by representative of manufacturer of alleged brand name item that agency improperly converted a brand name only procurement to a brand name or equal procurement is denied where it was clear from the solicitation that the agency would consider an offer of a product manufactured by the awardee.
2. Allegation that awardee will violate another firm's patents in performing a contract is dismissed because the matter is for consideration by the courts, not the General Accounting Office.

DECISION

Odetics, Inc., Data Management Systems Division, protests the award of a contract to ATA Defense Industries, Inc. (ATA) by the United States Marine Corps under request for proposals (RFP) No. M00264-91-R-0021. Odetics contends that it is the only firm capable of supplying the items required by the solicitation. We deny the protest in part and dismiss it in part.

The RFP solicited proposals for a quantity of "DART target mechanisms," which are portable electronic pop-up targets used for weapons training, and related supplies. The targets will replace targets used during Desert Shield/Desert Storm and augment existing stocks, which the agency obtained under a 1989 contract with ATA. Prior to issuing the RFP, the agency published a notice in the Commerce Business Daily (CBD) announcing its intention to negotiate a contract for the items with ATA on a sole-source

basis, but inviting other potential competitors to respond. Four firms, including ATA and Odetics, responded. The agency issued the RFP to all of them.

Before listing the required line items, the solicitation stated: "Target mechanism and related supplies as manufactured by ATA Defense Ind." After the list appeared the phrase "Brand Name is Mandatory. See (L-18)." Clause L-18 provided that the items described by reference to a manufacturer's name or part number must be furnished in strict accordance to the manufacturer's published data and that complete interchangeability with original equipment was mandatory. For each of the line items the solicitation listed a part number, identified ATA as the manufacturer, and described required features and performance characteristics. Offerors were required to bid the "exact model or current replacement model."

Odetics and ATA submitted the only proposals by the closing date of September 23, 1991. The agency found both proposals technically acceptable and made award to ATA based on its lower evaluated price of \$333,862.¹ Odetics, whose price was \$572,976, was advised of the award by letter dated September 30, 1991. On October 2, 1991, Odetics protested to our Office.

Odetics contends that it is the only firm that can manufacture or supply the equipment required by the RFP. According to Odetics, "DART" is a brand name target originally manufactured by Dart Defense Industries Pty. Ltd.² Odetics contends that a company it represents as U.S. distributor, Australian Defense Industries (ADI), acquired Dart Defense in 1990 and now owns the right to manufacture the items. If ATA were to manufacture the items, argues Odetics, such action would be a violation of ADI's U.S. patent. Odetics further contends that the Marine Corps is precluded from accepting ATA's offer because to do so would improperly convert a brand name only procurement to a brand name or equal procurement. In this regard, Odetics cites, among other cases, Deknatel Division, Pfizer Hospital Products Group, Inc., 70 Comp. Gen. 652 (1991), 91-2 CPD ¶ 97.

After learning of Odetics's protest, the agency's contracting activity asked the requiring activity to explain the significance of the term "DART." The requiring activity

¹Because of funding limitations, the agency reduced the quantity of targets; the contract price is \$298,007.

²The targets ATA supplied the Marine Corps under the 1989 contract were apparently made by Dart Defense.

reported that "DART" is not a specific brand name, but refers to the requirement for a disappearing automatic retaliatory target or DART. The agency argues that the brand name referred to in the solicitation was the target system manufactured by the firm named in the RFP; ATA. The agency urges dismissal of the protest, either because it is untimely or because it involves matters that this Office generally does not review: an allegation of patent infringement, an affirmative responsibility determination, and an issue of contract administration.

The principal issue in this case is whether the terms of the solicitation permitted the agency to contract for target systems made by ATA. We think the solicitation plainly did. The RFP prefaced the list of line items by advising that the listed items must be "as manufactured by ATA Defense Ind." A similar statement was repeated in the list of required features for each line item. Clause L-18 of the RFP, entitled "Brand Name Specified is Mandatory," provided that items described by reference to a manufacturer's name or part number must be furnished in strict accordance with the manufacturer's published data. ATA was the only manufacturer specified in the RFP and has offered to supply items that comply with solicitation requirements. In our view, the solicitation clearly allowed the agency to contract for items manufactured by ATA.

We find no merit to the protester's argument that the agency improperly converted a procurement for the "DART" brand name target to a brand name or equal procurement. The rationale underlying cases such as Deknatel Division, supra, that have found such a practice to be improper, is that it is unfair for an agency to lead a manufacturer to believe that only its product will be acceptable to the agency when in fact the agency is willing to accept the product of another manufacturer. In this case, it should have been abundantly clear to Odetics that the agency considered ATA to be a source for the required items. We believe that Odetics could not reasonably have concluded that the terms of the solicitation precluded an award for an ATA-manufactured product.

Regarding Odetics's allegation that performance of the contract by ATA will result in a violation of ADI's patents, this is a matter between those private parties, not appropriate for consideration under our bid protest function. A potential for patent infringement does not provide a basis for objecting to a contract award. Aircraft Porous Media, Inc., B-241665.2 et al., Apr. 8, 1991,

91-1 CPD ¶ 356. While we will consider a protest alleging that an agency's disclosure of proprietary data in a solicitation violates a firm's proprietary rights, see, e.g., Data General Corp., 55 Comp. Gen. 1040 (1976), 76-1 CPD ¶ 287, there has been no such allegation here.

The protest is denied in part and dismissed in part.

1/16/77

James F. Hinchman
General Counsel